No. 827

Office-Supreme Court, U.S.
FILED
FEB 25 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

CITY OF GALVESTON AND THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

HAROLD E. SPENCER
NUEL D. BELNAP
One North LaSalle Street
Chicago, Illinois 60602

V. W. MCLEOD
200 North Boulevard
Galveston, Texas 77550

E. V. GREENWOOD
Bank of the Southwest Bldg.
Houston, Texas 77002

J. L. LOCKETT, JR.
Texas Avenue Building
Houston, Texas 77001
Attorneys for Appellants

BELNAP, SPENCER, HARDY & FREEMAN

MCLEOD, ALEXANDER, POWEL & APFFEL

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI
Of Counsel

February 1967

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAkeview 5-6581

CONTENTS

	PAGE
Argument	2
Conclusion	10

CITATIONS

Cases

American Round Bale Press Co. v. A., T. & S. F. Ry. Co., 32 I.C.C. 458 (1914)	5
Automobiles to Southern Ports for Export, 216 I.C.C. 113 (1936)	2
Ayrshire Corp. v. United States, 335 U.S. 573	4
Baltimore & O. R. Co. v. Boston & M. R. Co., 373 U.S. 372	3
Burlington Truck Lines v. United States, 371 U.S. 156	9
City of Wilmington v. Alabama G. S. R. Co., 316 I.C.C. 709 (1962)	4
Interstate Commerce Comm'n v. Diffenbaugh, 222 U.S. 42	2
Interstate Commerce Comm'n v. Union Pacific R.R., 222 U.S. 541	5
Labor Board v. Metropolitan Ins. Co., 380 U.S. 438	9
Larabee Flour Mills Co. v. Chicago, B. & Q. R. Co., 223 I.C.C. 55 (1937)	5
Maritime Asso., Boston Chamber of Commerce, v. A.A.R.R. Co., 95 I.C.C. 539 (1925)	5
Nueces County Nav. Dist. v. Abilene & S. Ry. Co., 155 I.C.C. 712 (1929)	7

PAGE

Procter & Gamble Co. v. Alton & S.R., 183 I.C.C. 365 (1932) .. 5

Securities & Exchange Comm'n v. Chenery Corp., 318 U.S. 80; 332 U.S. 194 9

Southern Pacific Co. v. Interstate Commerce Comm'n, 219 U.S. 433 6

Texas & Pacific Ry. Co. v. United States, 289 U.S. 627 9

United States v. Illinois Central R.R., 263 U.S. 515 ..... 2, 5

Vegetables and Avocados, South to Official Territory, 269 I.C.C. 409 (1947) 5

Miscellaneous

Brief for the United States, Supreme Court of the United States, Nos. 97, 98 and 99, O.T. 1962, Baltimore & O. R. Co. v. Boston & M. R. Co. 3

In the
Supreme Court of the United States

OCTOBER TERM, 1966

No. 827

CITY OF GALVESTON AND THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

Pursuant to rule 16(3), appellants submit this brief in opposition to the motion to affirm filed jointly by the United States, the Interstate Commerce Commission, and the Secretary of Agriculture (the Government) and to the motion to affirm filed jointly by Nueces County Navigation District No. 1 and Gulf Compress (Corpus Christi).

ARGUMENT

I.

1. The motions ignore the basic question presented (J.S., pp. 4, 8-15): whether a misalignment of rates, relative transportation services considered, is an essential element of undue preference and prejudice under section 3(1) of the Interstate Commerce Act. The Government's motion is an obvious attempt to divert the Court's attention from this issue. The Corpus Christi motion is little more than an attempt to offer a *post hoc* rationalization of the order on grounds on which the Commission did not rely in entering it.

The Government offers no theory upon which the assailed order can stand consistently with the cases in which the Commission has held that it cannot compel carriers to equalize rates to competing ports in disregard of substantial differences in distance or with this Court's opinions in *Interstate Commerce Comm'n* v. *Diffenbaugh*, 222 U.S. 42 and *United States* v. *Illinois Central R.R.*, 263 U.S. 515 (J.S., pp. 9-13). It is unable to point to a single test by which the assailed rates can be said to be prejudicial.[1]

---

[1] For a particularly apt statement of the applicable legal principle, see *Automobiles to Southern Ports for Export*, 216 I.C.C. 113, 122 (1936), where the full Commission said:

> The principal north Atlantic United States port with which, the record indicates, the southern ports have been, or are likely to be, in competition for such traffic is New York. In view of the fact that the proposed rates to the southern ports are lower in level, distance considered, than the present rates to New York from the same origin points, we are unable to conclude that they would result in preference of New York and prejudice to southern ports.

There, as here, the rates to the allegedly prejudiced ports were higher in absolute amounts because of the longer distances, but were "lower in level, distance considered." If such rates were not prejudicial there, they are not prejudicial here. The Commission has no discretion to apply inconsistent legal standards of what constitutes "prejudice" and to do so is arbitrary.

Its argument merely comes down to the proposition that the rates are prejudicial simply because the Commission says they are.[2]

No one, the Commission, the District Court, or any appellee, has yet been able to answer the fundamental question: How can rates be adjudged to be "prejudicial" if they have not been shown to be improperly proportioned to the services rendered? If the Court should sustain the Commission's power to adjudge rates to be "prejudicial" in the absence of that element, it would be conferring on the Commission a wholly arbitrary power to compel the carriers to adopt any policy of ratemaking the Commission desires. It would also be conferring on the Commission the power to hold that the advantage of location is an undue preference and the power to equalize fortunes, opportunities, and abilities.

2. The motion of the Government does not deny, and the Corpus Christi motion admits (p. 13), that, in entering its order, the Commission was following a "policy" of port equalization. Such a policy is clearly contrary to the provisions of section 3(1) of the Act (J.S., pp. 18-21).

---

[2] It is understandable why the Commission takes such a position, but the position of the United States seems to be in conflict with its position in *Baltimore & O. R. Co.* v. *Boston & M. R. Co.*, 373 U.S. 372. In that case (Nos. 97, 98, and 99, O.T. 1962) the brief for the United States (note 20, p. 36) said:

> In our view, each port, so far as practicable, should be given an opportunity to realize its own advantages, whether the advantage is a natural one (*e.g.*, location or the possession of a good harbor) or a commercial one (*e.g.*, the availability of frequent sailings). We would not endorse the view that rates should be designed to cancel out inherent advantages. Whether this was the Commission's design is not made clear by its report.

No attempt is made by the Government or by Corpus Christi to argue that such a policy is consistent with the requirements of the Act.

II.

1. The Government's argument that the order is within the discretion of the Commission rests on two cases, *City of Wilmington* v. *Alabama G. S. R. Co.*, 316 I.C.C. 709 (1962) and *Ayrshire Corp.* v. *United States*, 335 U.S. 573, neither of which is pertinent to the present inquiry. *City of Wilmington* was a case in which carriers disregarded substantial differences in distance to voluntarily equalize ports and the question was whether the resulting prejudice was "undue." In *Ayrshire*, in referring (335 U.S. at 593) to the Commission's discretion "to accommodate the factors of transportation conditions, distance and competition," the Court was not referring to the tests by which the Commission found "prejudice" in the rates, but was referring to the Commission's power, having found undue prejudice (based, among other things, on a misalignment of rates) to remove that prejudice. In other words, the Court recognized that the Commission had broad discretion to say that though the prescribed rates might still be "prejudicial," they would not be "unduly" so. The Court clearly did not, by such language, intend to confer on the Commission a right to arbitrarily find the existence of prejudice in the absence of a misalignment of rates, relative transportation services considered.

Appellants do not question the Commission's broad discretion to determine whether prejudice (obvious, proven, or admitted) is "undue," but, as pointed out in our jurisdictional statement (p. 14), there is a vast difference between the two inquiries: (1) by what tests is a preferential and prejudicial relationship to be known, and (2)

on what grounds may such a relationship be deemed free from the prohibitions of the statute. Being unable to indicate any test by which the assailed rates may be found to be "prejudicial," the Government refuses to recognize the foregoing distinction and, therefore, in its attempt to rely on such cases as *City of Wilmington* and *Ayrshire*, it is forced into the untenable position that whatever the carriers may lawfully do voluntarily to meet competition, the Commission may compel them to do. The only citation of authority for its position, *United States* v. *Illinois Central R.R.*, 263 U.S. 515, 523-525, clearly does not support it; it refutes it.

Nowhere in its opinion in *Illinois Central* did the Court suggest that there was no distinction between what the carriers may lawfully do to meet competition and what the Commission may compel them to do. On the contrary, not only does the Court's reasoning clearly indicate the existence of such a distinction but its reliance (263 U.S. at 525) on *Interstate Commerce Comm'n* v. *Union Pacific R.R.*, 222 U.S. 541, 553, is explicit recognition of such a distinction. In *Union Pacific*, the Court said:

> "It is quite true that the carriers may do what they could not be compelled to do."[8]

---

[8] There are many Commission cases recognizing such a distinction. Representative examples are *American Round Bale Press Co.* v. *A., T. & S. F. Ry. Co.*, 32 I.C.C. 458, 468 (1914); *Maritime Asso., Boston Chamber of Commerce* v. *A.A.R.R. Co.*, 95 I.C.C. 539, 565-566 (1925). *Procter & Gamble Co.* v. *Alton & S.R.*, 183 I.C.C. 365, 367 (1932); *Larabee Flour Mills Co.* v. *Chicago, B. & Q. R. Co.*, 223 I.C.C. 55, 63 (1937); *Vegetables and Avocados, South to Official Territory*, 269 I.C.C. 409, 411 (1947).

In *Illinois Central* the Court also pointed out the distinction between that case and *Southern Pacific Co.* v. *Interstate Commerce Comm'n*, 219 U.S. 433, where it was held that the Commission could not, under the guise of an order, proper in form, purporting to find existing rates unlawful, compel the railroads to adopt a different policy of ratemaking than they wished to follow. In *Illinois Central* there was a misalignment of rates, relative transportation services considered. The Court pointed out that "discrimination" was not denied and that the rates from the prejudiced point were higher than rates from competing points "for the same or longer distances." 263 U.S. at 521. Here there is no such misalignment. The situation here is similar to that in *Southern Pacific*. Here the Commission simply used a formal finding of unlawfulness as a device to compel the carriers to follow a policy of ratemaking that they do not wish to follow.

2. Since the Government's entire argument is based on the false premise that what the carriers may voluntarily do the Commission can compel them to do, its entire argument falls.

a. It is not correct to say, as charged by the Government (Mot., p. 5), that it is appellants' position that the Commission must consider distance "to the exclusion of all other factors." What appellants contend is that the determination of whether there is "prejudice" in rates and the determination of whether an acknowledged or proven prejudice is "undue" are two different inquiries and the significance of the distance factor is wholly different depending upon which inquiry is involved (J.S. pp. 14-15, esp. note 9).

b. Based on its false premise, the Government argues (Mot., pp. 5-6) that "the distance factor is not so sub-

stantial . . . [as] to compel a rate differential." Appellants do not contend that the distance factor "compels" a rate differential. Appellants contend that the Commission has no power to condemn an *existing* differential in the absence of a showing that it is improperly proportioned to the additional services rendered.

c. Again based on its false premise, the Government argues that the order should be sustained because "on the average" the distances to Corpus Christi exceed those to Galveston and Houston by less than 25 percent, which the Government terms "slight."[4] Again, the Government evades the question. The question is not whether equalization of rates in disregard of 25-percent differences in distance would be lawful. The question is: "Are the *existing* rates unlawful? The Government makes no attempt to show upon what basis such rates could be held to be unlawful.

d. The fact that the same rates apply to Galveston and Houston is no basis for sustaining the order. While the

---

[4] The differences in distance (ranging up to sixty percent) cannot properly be termed "slight." They are almost exactly the same as in *Nueces County Nav. Dist.* v. *Abilene & S. Ry. Co.*, 155 I.C.C. 712 (1929), Corpus Christi's previous attempt to secure equalization of cotton rates with Galveston and Houston, in which the Commission held that Corpus Christi's distance disadvantage was "of such a substantial character as to preclude a requirement by us that it be neutralized by freight-rate adjustment." 155 I.C.C. at 715. Furthermore, it is improper to deal with such differences "on the average." We are not here dealing with group rates but with individual point-to-point rates. Obviously a 25-percent point is not "representative" of a 55-percent point when dealing with individual point-to-point rates. The Commission did not attempt to support its order by the use of any such averages.

Commission noted that there were differences between the short-line miles and the Docket No. 28300 miles (J.S., App. p. 23), it did not attach any significance to that fact but rather proceeded on the theory that whatever the mileage differences were between Corpus Christi, on the one hand, and Houston and Galveston, on the other, it had the right to ignore them to compel the carriers to follow a policy of port equalization. It is on that basis that its order must be judged.[5]

e. There is no merit to the Government's assertion that because the Commission has disregarded equivalent differences in distance in certain grain cases, it may do so here.[6] The facts in those cases were substantially differ-

---

[5] Contrary to the implication in the Government's motion (p. 4), Corpus Christi is not equalized with Galveston and Houston on "other commodities" except where such equalization has been compelled by the Commission in the "grain" cases (see paragraph (e), *infra*). Also, the statement at the bottom of page 6 of the Corpus Christi motion that the class-rate distances and class rates shown in appendix D of our jurisdictional statement are erroneous is incorrect. From the origins here involved the class-rate distances and, therefore, the class rates themselves, are the same to Houston and Galveston, but such rates are higher to Corpus Christi because of the longer distances. As appendix D shows, except from the relatively unimportant origins in Oklahoma, Corpus Christi now has a more favorable relation vis-a-vis Galveston and Houston with respect to the rates on export cotton than it does with respect to the class rates prescribed by the Commission, which are a commonly employed test of lawful rate relations (J.S., note 1, p. 6). If the Commission had attempted to rationalize its order on the ground suggested by appellees, it would have had to make explanatory findings on the many unmentioned ramifications of this subject.

[6] It is significant that the Government does not attempt to defend the District Court's rationalization of these cases as being "relevant transportation conditions." (J.S., pp. 16-17)

ent from those here presented (J.S., pp. 16-18) and, in any event, such Commission decisions would have no precedential value here, for when the Commission assumes a power plainly not granted to it, no amount of interpretation by the Commission that it has such power is binding on the courts. *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 640.

III.

Appellees do not challenge in any respect the allegations of section IV of our jurisdictional statement in which we listed six principal reasons which the District Court gave for sustaining the order, none of which were given by the Commission as a reason for entering it.

We do not contend that this issue alone requires further briefing and argument, but it certainly requires reversal of the judgment below. *Securities & Exchange Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 94-95; 332 U.S. 194, 196; *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-169; and *Labor Board* v. *Metropolitan Ins. Co.*, 380 U.S. 438, 442-444. The law is clear, the errors are obvious, and they are impliedly conceded by the silence of appellees.

CONCLUSION

We submit that the issues raised by this appeal are of the greatest substantiality and public importance, that they are presently ripe for review and should be now resolved by this Court, and that their proper disposition requires briefing and argument on the merits. If, however, the Court does not agree, then the proper disposition of this appeal would be summary reversal for further consideration by the District Court.

Respectfully submitted,

HAROLD E. SPENCER
NUEL D. BELNAP
One North LaSalle Street
Chicago, Illinois 60602

V. W. McLEOD
200 North Boulevard
Galveston, Texas 77550

E. V. GREENWOOD
Bank of the Southwest Building
Houston, Texas 77002

J. L. LOCKETT, JR.
Texas Avenue Building
Houston, Texas 77001
Attorneys for Appellants

BELNAP, SPENCER, HARDY & FREEMAN
McLEOD, ALEXANDER, POWEL & APFFEL
FULBRIGHT, CROOKER, FREEMAN,
BATES & JAWORSKI
Of Counsel

February, 1967